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INTERNATIONAL COUNTERTRADE

Draft Legal Guide on International Countertrade Transactions

Report of the Secretary-General

Addendum

I. INTRODUCTION

A. Origin and purpose of the Legal Guide

1. This Legal Guide was prepared by the United Nations Commission on International Trade Law (UNCITRAL) and by its Working Group on International Payments. In addition to representatives of member States of the Commission, representatives of many other States and of a number of international organizations participated actively in the preparatory work.

2. The Commission considered work to be undertaken in the area of countertrade in 1986, in the context of the discussion of the Commission's work in the field of the new international economic order. 1/ In 1989 the Commission decided to prepare a legal guide on international countertrade transactions and requested the Secretariat to prepare draft chapters of such a guide. 2/ The draft chapters were discussed at the twenty-third session of the Commission in 1990, 3/ and at the twenty-third session of the Working Group on International Payments in 1991. 4/ [The Commission reviewed the revised draft chapters and approved the Legal Guide at its twenty-fifth session in 1992, subject to editorial modifications left to the Secretariat. 5/]

3. In preparing draft materials for consideration by the Commission and the Working Group, the Secretariat consulted with practitioners and other experts in the field of international countertrade. In addition, it examined model contract forms, general contract conditions and individual contracts from various parts of the world. Such sources are too numerous to be acknowledged individually; however, recognition is hereby given to their contribution in the preparation of the Legal Guide.

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4. The preparation of the Legal Guide was motivated by an awareness that parties engaging in countertrade may lack relevant legal knowledge and experience, and that as a result they may not find optimal contractual solutions to legal issues that may arise in countertrade transactions. Those issues arise in particular from the fact that countertrade transactions are composite transactions encompassing the supply of goods in two directions, that there is a contractual link between those supplies of goods and that countertrade transactions often contain commitments of parties to enter into future contracts. Contractual solutions are particularly important in this area because national legislations often do not contain provisions specific to countertrade. Legal difficulties in this area may adversely affect many parties from developing countries, as well as parties from industrially developed countries, in particular if they do not regularly engage in countertrade.

5. The Legal Guide seeks to assist parties negotiating international countertrade transactions by identifying the legal issues involved, discussing possible approaches to the solution of the issues and, where appropriate, suggesting solutions that the parties may wish to agree on. The discussion in the Guide takes into account disparities among national laws. It is hoped that one result of the Guide will be to promote the development of an international common understanding as to the identification and resolution of legal issues arising in connection with countertrade transactions.

6. The Legal Guide has been designed to be of use to persons involved at various levels in negotiating and drawing up contracts in international countertrade transactions. It is intended for use by lawyers as well as by participants in countertrade who do not have a legal background. The Guide is also intended to be of assistance to persons who have overall managerial responsibility, and who require a broad awareness of the structure of those transactions and the principal legal issues to be covered by them. It is emphasized, however, that the Legal Guide should not be regarded by the parties as a substitute for obtaining legal advice from competent advisers.

7. It should be noted that the various solutions discussed in the Legal Guide will not govern the relationship between the parties unless they expressly agree upon such solutions, or unless the solutions result from provisions of the applicable law. In addition, the Legal Guide is not intended to be used for interpreting agreements or contracts in countertrade transactions.

B. Arrangement of the Guide

8. Chapter II defines the scope of the Legal Guide by describing transactions covered by it and by explaining the focus of the discussion and the types of issues addressed. Since a prevailing terminology has not developed in countertrade practice, particular notice should be taken of chapter II, section E, which sets out certain terms specific to countertrade that are used throughout the Guide.

9. Chapter III describes possible contracting approaches to structuring a countertrade transaction. Chapter III also sets out possible types of contract clauses that parties may use, depending on the contracting approach chosen. Those types of clauses are discussed in chapters IV to XV. The

discussion in the Legal Guide is restricted to those types of clauses that are specific to or of special importance for countertrade transactions.

10. Some of the clauses discussed in the Legal Guide are essential for establishing a countertrade transaction. Other clauses discussed in the Guide, while not necessarily essential, may be useful in the context of the particular commercial circumstances. In view of the great variety of circumstances in which countertrade transactions are concluded, the Legal Guide does not contain a general suggestion as to the types of clauses that parties should agree upon. It is for the parties to each transaction to judge the extent to which the issues considered in the Guide are relevant to their transaction.

C. Recommendations in the Guide

[The following paragraph, except for the underlined modifications, appeared in document A/CN.9/332/Add.1, under the title "I. Introduction to Legal Guide".]

11. Where appropriate, the Legal Guide contains suggestions as to how certain issues in a countertrade transaction might be settled. Three levels of suggestion have been used. The highest level is indicated by expressions to the effect that the parties "should" take a particular course of action. Such expressions are used sparingly in the Guide and only when a particular course of action is a logical or legal necessity. An intermediate level is used when it is "advisable" or "desirable", but not logically or legally required, that the parties adopt a particular course of action. The lowest level of suggestion is expressed by formulations such as "the parties may wish to consider" or "the parties might wish to provide", or the agreement by the parties "might" contain a particular solution. The wording used for a particular suggestion may be, for drafting reasons, varied somewhat from that just indicated; however, it should be clear from the wording what level of suggestion is intended.

D. Illustrative provisions

[The following two paragraphs, except for the underlined modification, have been taken from document A/CN.9/WG.IV/WP.51/Add.7, paragraph 4.]

12. Some chapters of the Legal Guide contain one or more "illustrative provisions" set forth in footnotes. They are included in order to make issues discussed in the text of a chapter easier to understand. They also serve to illustrate how certain solutions discussed in the text might be structured. Illustrative provisions have not been included where an understanding of an issue and guidance to drafting is clearly obtainable from the text of the chapter, or where a provision cannot be drafted in isolation from the particular countertrade transaction.

13. It is emphasized that illustrative provisions should not necessarily be regarded as models for inclusion in particular agreements entered into by the parties. The precise content and formulation of a clause may vary with each countertrade transaction. In addition, there is usually more than one possible solution to an issue, even though only one of those possible

solutions is presented in an illustrative provision. It is therefore important that parties who draft a provision based upon an illustrative provision carefully consider whether the provision fits harmoniously within their countertrade transaction.

Notes

1/ Report of the United Nations Commission on International Trade Law on the work of its nineteenth session, Official Records of the General Assembly, Forty-first Session, Supplement No. 17 (A/41/17), paras. 235 to 243.

2/ Report of the United Nations Commission on International Trade Law on the work of its twenty-second session, Official Records of the General Assembly, Forty-fourth Session, Supplement No. 17 (A/44/17), para. 249.

3/ Report of the United Nations Commission on International Trade Law on the work of its twenty-third session, Official Records of the General Assembly, Forty-fifth Session, Supplement No. 17 (A/45/17), paras. 11 to 18 and annex I.

4/ Report of the Working Group on International Payments on the work of its twenty-third session (A/CN.9/357).

[5/ Report of the United Nations Commission on International Trade Law on the work of its twenty-fifth session, Official Records of the General Assembly, Forty-seventh Session, Supplement No. 17 (A/47/17), paras. _____.]